

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THUY TRAN)	
Claimant)	
VS.)	
)	Docket Nos. 150,280 & 154,195
EXCEL CORPORATION)	
Respondent)	
Self Insured)	

ORDER

Claimant appeals from the Decision entered by Administrative Law Judge Pamela J. Fuller on August 7, 2000. The Appeals Board heard oral argument January 17, 2001.

APPEARANCES

Claimant appeared by her attorney, Terry J. Malone of Dodge City, Kansas. Respondent, a qualified self insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Decision.

ISSUES

The parties stipulated that claimant suffered two accidents arising out of and in the course of employment with respondent, one on January 2, 1990 (Docket No. 150,280) and a second on July 9, 1990 (Docket No. 154,195). Judge Fuller awarded permanent partial disability compensation in Docket No. 150,280 based upon the stipulated whole body functional impairment of 7 percent. Neither party filed a brief on this appeal to the Board, relying instead on their submission letters to the ALJ. The only issue claimant raised in her Application for Review was "whether the claimant was entitled to temporary total disability benefits from July 21, 1990 through December 29, 1990" for the July 9, 1990 accident. In an Amended Application for Review claimant added a second issue concerning "the

claimant's average weekly wage", likewise in Docket No. 154,195.¹ During oral argument to the Board, however, claimant also argued the nature and extent of her disability, specifically whether she is entitled to an award for work disability in excess of her percentage of functional impairment.² Conversely, respondent requests that Judge Fuller's Decision be affirmed in its entirety.

Accordingly, the issues on appeal are as follows:

- (1) Average weekly wage. Claimant argues that her average weekly wage should be calculated by using a 7-day or, in the alternative, a 6-day work week, applying principles from Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). Respondent argues a 5-day work week should be used.
- (2) Temporary total disability compensation. The ALJ awarded 14.71 weeks of temporary total disability compensation for the period of July 28, 1990 until November 7, 1990. Claimant contends she was temporarily and totally disabled due to her injury through December 29, 1990.
- (3) Nature and extent of disability. The ALJ found claimant should be limited to the agreed 7 percent functional impairment to the body as a whole because after her accident claimant returned to an accommodated job with respondent and earned a comparable wage. Thus, the presumption of no work disability applied and was not overcome. The ALJ also found claimant retained the ability to earn a comparable wage even after she left her employment with respondent in November of 1999.

Claimant, on the other hand, argues she is entitled to a work disability award higher than the percentage of functional impairment. Claimant contends that during part of the period of time she worked for respondent after her accident her injuries and work restrictions prevented her from working overtime and this reduced her earnings to less than her pre-injury average weekly wage. Second, claimant contends her injury reduced her ability to earn wages in the open labor market to less than what her average weekly wage was at the time of her accident.

¹ It is assumed that this issue also pertains to the first accident even though only Docket No. 154,195 was listed on claimant's Application for Review and Amended Application for Review.

² Presumably, this issue would pertain to both accidents although the ALJ awarded permanent disability benefits only for the January 2, 1990 accident. Before the ALJ, nature and extent was only raised as an issue in Docket No. 150,280.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Decision entered by Judge Fuller should be modified to find an average weekly wage of \$420.86, but is otherwise affirmed.

Claimant is entitled to benefits based on a 7 percent permanent partial disability to the body as a whole and an average weekly wage of \$420.86. The Board also finds claimant is not entitled to an award for additional temporary total disability compensation. The Board adopts as its own the findings and conclusions enumerated by the ALJ in the Decision.

For an hourly employee, the average weekly wage is computed by first calculating a daily rate. The daily rate is the hourly rate times the number of hours constituting an ordinary day. The daily rate is then multiplied by the number of days the employee is regularly expected to work. K.S.A. 44-511 (Ensley). Tovar held that the average weekly wage should be based on a 6-day work week for an employee who is expected to keep Saturdays open and be available to work 6 days per week. Claimant's regular work week was Monday through Friday. But claimant testified she was also expected to work on Saturdays and Sundays when scheduled to do so.

Before her accident claimant worked a considerable amount of overtime. But she worked only one Sunday during the 26 weeks before her first injury. Furthermore, the evidence does not show which overtime was worked on Saturday and which on other days. It cannot be assumed all overtime was on Saturday or how many Saturdays claimant actually worked. Claimant could not recall how often she was scheduled to work weekends. The record fails to establish that claimant was regularly expected to and, in fact, did work on Saturdays and as a result kept herself available to work on Saturdays. Claimant is not entitled to a wage calculated on the basis of a 7-day nor a 6-day work week.

In the 26 weeks before her January 2, 1990 injury, claimant received overtime pay of \$1,458.17. Added to this is the night premium pay (\$20.90), double pay (\$71.01), break pay (\$100.58) and lunch pay (\$15.78). This would bring the total overtime pay for the 26 week period to \$1,666.44. It is not clear what the "back pay" (\$17.74) was for but the dollar amount makes it appear to have been for "break pay" that claimant didn't get paid for the week prior. Including these items of additional compensation with the overtime pay results in a total of \$1,684.18. When this is divided by 16 (the number of weeks claimant actually worked during the 26 weeks before the accident) and added to the base weekly wage of \$315.60, the average weekly wage is \$420.86.

Claimant is not entitled to an award of work disability. There is a presumption that an injured worker who returns to work and earns a wage comparable to that which the worker was earning at the time of the injury has no work disability. In this case, the presumption of no work disability contained in K.S.A. 44-510e (Ensley) has not been overcome. In addition, claimant voluntarily quit her accommodated job with respondent. Had she not quit, claimant would likely still be working for respondent and earning a wage in excess of the average weekly wage she was earning at the time of her accident. Furthermore, after relocating to Michigan, claimant was able to find employment that paid well in excess of the average weekly wage she was earning at the time of her injury. This is persuasive evidence that even in the open labor market claimant retains the ability to earn a comparable wage.

The parties stipulated to a 7 percent functional impairment. This percentage of permanent impairment was not apportioned between the two accidents. The ALJ awarded permanent partial disability compensation only for the first accident. The Board affirms this finding. The Board further finds that any worsening in claimant's condition from the automobile accident cannot be treated as a natural and probable consequence of the first injury. Instead, the Kansas Court of Appeals has held that an injury suffered in an accident traveling to or from medical treatment for a work related injury must be considered a new accident under the Act. Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

AWARD

WHEREFORE, the Appeals Board finds that the Decision entered by Administrative Law Judge Pamela J. Fuller, dated August 7, 2000, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thuy Tran, and against the respondent, Excel Corporation, a qualified self insured, for an accidental injury which occurred January 2, 1990 and based upon an average weekly wage of \$420.86. Claimant is entitled to 415 weeks at the rate of \$19.64 per week, or \$8,150.60, for a 7% permanent partial general disability. Claimant is also entitled to 14.71 weeks of temporary total disability at the rate of \$229.41 per week, or \$3,374.62, for the accident date of July 9, 1990. As of October 4, 2001, there is due and owing to claimant permanent partial disability compensation of \$8,150.60 and temporary total disability compensation of \$3,374.62 for a total of \$11,525.22, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the Decision to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Malone, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director